No. 22535 & 22535-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 1968

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF DEFENDANT ECONO-CAR INTERNATIONAL, INC.
ANSWERING BRIEF OF PLAINTIFF CARL M. TAUTE

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
500 Electric Building
P. O. Box 2529
Billings, Montana 59101

FILED

Filed MAY 2 1968 1968

WM. B. LUCK, CLERK Clerk

SUBJECT INDEX

SUBJECT INDEX i

TABLE OF CASES ii

STATUTES ii

OTHER AUTHORITIES ii

ARGUMENT 1

A. PLAINTIFF'S DAMAGES LIMITED BY WHAT HE WOULD HAVE RECEIVED ABSENT ANY BREACH 1

B. SPECIFIC BREACHES ALLEGED BY PLAINTIFF 6

1. TERM OF LEASE ON AUTOMOBILES 6

2. INSURANCE TERM PROVISIONS 9

3. TURN-IN CHARGES 11

4. PLAINTIFF'S CLAIM OF BREACH OF ADVERTISING PROVISIONS 12

SUMMARY AND CONCLUSION 14

TABLE OF CASES

	Page
Harrington v. Moore Land Co., 59 Mont. 421, 196 Pac. 975 (1921)	4
Mitchell v. Carlson, 132 Mont. 1, 313 P.2d 717 (1957)	5
Myers v. Bender, 46 Mont. 497, 129 Pac. 330 (1913)	3
Tanenbaum v. Francisco, N.J. 1933, 166 Atl. 105 . . .	2

STATUTES

Revised Codes of Montana 1947, Section 17-301	3
Revised Codes of Montana 1947, Section 17-302	3

OTHER AUTHORITIES

Restatement of Contracts, Section 329, Comment a	2
25 C.J.S. 867, Damages, Section 78	2

ARGUMENT

A. Plaintiff's Damages Limited by What he Would have Received Absent Any Breach

The Court's instructions are based upon the rule that the measure of damages for breach of contract is the amount which will compensate the party aggrieved for all detriment proximately caused by the breach not exceeding what the aggrieved party would have received had the contract been performed by the defendant.

Plaintiff not being satisfied with this standard, is seeking damages in the nature of restitution to his original position. Plaintiff is seeking not only any damages flowing from the alleged breaches, but is also seeking to recover his capital contributions, his alleged operating losses and compensation for the time expended by him and his wife in the operation of the business. Thus, plaintiff does not seek damages for breach of contract, but wants total and complete restitution at defendant's expense irrespective of whether plaintiff's operations would have been more successful if none of the alleged breaches of contract had occurred. We know of no authorities--New Jersey, Montana, or otherwise, setting forth such a measure of damages.

No New Jersey law was cited by plaintiff's counsel to the trial court. Nonetheless, plaintiff is correct in stating that the contract provides that the contract is to be construed in accordance with New Jersey law. Whether New Jersey law or Montana law applies appears immaterial in view of the fact

that both states generally follow the basic rule for measuring compensatory damages for breach of contract as stated in Comment a., Restatement of Contracts, § 329 as follows:

> "In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract. . . ."

Even though the New Jersey authorities cited in plaintiff's brief are not in point on the facts (because those cases and authorities involve situations where a party to a contract, and in particular a contractor, was prevented from fulfilling his terms of the contract by the other party's breach thereof) these cases nevertheless apply the same measure of damages. For example, quoting from plaintiff's brief, the Court in Tanenbaum v. Francisco, N.J. 1933, 166 Atl. 105, stated in part:

> "It is well settled that, whenever one party to a contract prevents the other from carrying out the terms thereof, the other party may treat the contract as broken and abandon it, and is entitled to such profits as he would have received had there been a complete performance." (Emphasis ours).

See also another quotation from plaintiff's brief:

> "Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party prevented from doing so, he is entitled to be placed in as good a position as he would have been had the contract been performed . . . When a plaintiff sues on a contract to recover the amount he would have received for the full performance prevented by defendant's breach, he seeks in effect to recover as damages the profit from performance of the contract, which profit defendant's breach prevented him from earning." 25 C.J.S. 867, Dam-

In this case the maximum that plaintiff could be entitled to receive under the breach of contract portion of the action would be his actual loss sustained by reason of any breaches of the contract. This is not, however, what plaintiff is seeking. The plaintiff instead, is attempting to convince the courts that he would be entitled to be placed in as good a position or better than if he had never entered into the contract in the first instance.

Under Montana law plaintiff's damages for alleged breach of contract would be clearly limited to that which he would have received had the contract been fully performed by the defendant.

Pertinent Montana statutes include the following:

> "17-301. Measure of damages for breach of contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (R.C.M. 1947, § 17-301.)

> "17-302. Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (R.C.M. 1947, § 17-302.)

In Myers v. Bender, 46 Mont. 497, 129 Pac. 330 (1913) plaintiff brought an action to recover for services as an attorney rendered to the defendant, a part of which compensation was based upon a contingent fee arrangement involving the value of land and money recovered in an action. One of the issues involved in the appeal was whether or not the district court applied the proper measure of damages for the breach by

defendant of his obligation to pay to plaintiff the amount contracted for. The Court stated in part:

> "If the defendant had made full payment upon the completion of plaintiff's services, he would have fully performed his contract. Since he did not make such payment, he is to be held to compensate plaintiff for the detriment 'proximately caused' by the delay. 'In the ordinary course of things' the only detriment which could result to him was the loss by plaintiff of the use of the money. Therefore full compensation for the detriment thus caused is to be measured by the principal amount due, together with interest at the legal rate up to the date of trial, allowing, of course, credit for such payments as have been made, at their respective dates.
>
> * * *
>
> "The statute (referring to R.C.M. 1947, § 17-301) embodies the common-law rule, and the authorities generally agree that the damages recoverable in such cases must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. In no case is the plaintiff entitled to recover anything more than he would have received had the contract been performed by the defendant on his part, assuming that it had been performed." (Emphasis ours). 129 Pac. at p. 333.

In Harrington v. Moore Land Co., 59 Mont. 421, 196 Pac. 975 (1921) plaintiff buyers of land sued the seller to recover damages for alleged negligence in sowing crops on a certain portion of the land. The court in discussing the measure of damages stated in part:

> "After an examination of the complaint and all of the evidence in this case, we are of opinion that the rule of damages applicable is that plaintiffs are entitled to recover such reasonable amount as will compensate them for defendant's failure to do the work agreed, and such additional amount as in the ordinary course of things would likely result from the breach of

contract. The damages recoverable, however, must be clearly ascertainable in both nature and origin.

* * *

"In no event would the plaintiffs be entitled to recover anything more than they should have received had the contract been performed by the defendant on its part, assuming it had been performed." 196 Pac. at p. 976.

In Mitchell v. Carlson, 132 Mont. 1, 313 P.2d 717 (1957) a purchaser of a residence sued the builder for damages for defects in construction. The court discussed the measure of damages, the instructions given and R.C.M. 1947, § 17-301, and then stated:

"Applying the statutory rule of damages to this case it is apparent that plaintiffs will be compensated only for the 'detriment proximately caused' by the breach, viz., the cost of making the repairs necessary to complete the house in accordance with the parties' agreement. The phrase 'proximately caused' restrains the jury from awarding damages beyond the amounts proven in the evidence at the trial resulting from defendant's breach of contract." 313 P.2d at 720.

Plaintiff in a slightly different approach to the amount of damages, attempts on page 33 of his brief to have the statements made by Burko prior to the execution of the franchise agreement which were strictly and solely in the nature of projected income figures to be taken as a measure of damages here. This testimony was, of course, not admissible for any purpose and certainly not for the purpose of showing the amount of damages sustained by plaintiff by reason of any breaches of contract of the defendant. In addition, plaintiff also is attempting to take the figures from Plaintiff's

Exhibit 22 as something of a guarantee of profit in his business and states that he should be entitled to comparable profits. Exhibit 22 is, of course, merely a general guide for Econo dealers so that they could better analyze their own operation to see if they were comparing favorably to other Econo dealers. This also, would have no relationship to the measure of damages for any breaches of contract which the defendant was guilty of.

B. <u>Specific Breaches Alleged by Plaintiff</u>

1. <u>Term of Lease on Automobiles</u>.

One of plaintiff's principal complaints revolves around the length of lease term of the automobiles. An outline of the background may help.

One of the obligations of the defendant under the franchise agreement was to make available to the plaintiff a quantity of automobiles for use in the rent-a-car business. Obviously, the terms and conditions under which Econo-Car itself might be able to obtain the necessary automobiles could well change from year to year. As these circumstances changed, it would be only natural that the terms and conditions under which Econo-Car would supply automobiles to its dealers would be expected to change to fit the circumstances. The franchise agreement itself clearly contemplates and authorizes such changes. For example, the agreement provides that the vehicles "may be made available to the Econo dealer on the basis of sale, lease, or whatever other method or methods that Econo-Car shall negotiate in behalf of all of its Econo dealers."

(Para. 4.D, Pltf's. Exh. 6). The agreement also provides that Econo dealer (plaintiff here) agrees that all vehicles "must be acquired by the Econo-dealer on the basis described in Schedule "B", or upon such other basis as may be presented by Econo-Car for the benefit of the entire Econo-Car rental system." (Para. 5.C of Pltf's. Exh. 6).

Turning to the facts here, Schedule "B" of Plaintiff's Exhibit 6 provides that each lease thereunder should run for a minimum period of twelve months to a maximum of 18 months. Even though plaintiff testified at trial that it had been explained to him that he would have the option of extending the lease, he nevertheless signed Plaintiff's Exhibit 7 providing for a lease period of 18 months but giving Econo-Car the option to shorten it to 12 months. This instrument was signed during the summer of 1963 prior to his starting any operations whatever.

Causing considerable confusion in the trial of this case was the fact that plaintiff elected not to commence operations with 1963 model vehicles, but rather elected to wait until the 1964 models came out. At the time that the original franchise agreement was signed as well as the time that the lease agreement, Plaintiff's Exhibit 7, was signed, 1963 model automobiles were in use by the Econo-Car dealers. Schedule "B" of the agreement refers to these 1963 automobiles, and the 1964s had not yet been made.

Quite obviously, Econo-Car International, Inc. negotiated arrangements with its vehicle supplier, Chrysler Leasing Corporation, on a slightly different basis for the 1964

automobiles than it had for the 1963 automobiles. As a result of these changed circumstances, Econo-Car notified all dealers under cover of letter dated November 27, 1963, that there would be a substantial rate reduction in the amounts that the local dealers had to pay per month for each automobile in their fleets, and also that the 1964 automobiles would be available on a 12 month leasing term instead of the previous 18 month, with the option in either party to extend the term for up to two months. (See Plaintiff's Exhibit 9). This was the arrangement under which the 1964 models were put out to the Econo dealers. This was the arrangement under which the parties were operating when the exchange of correspondence occurred (Plaintiff's Exhibit 11) wherein plaintiff requested special permission from Econo-Car International, Inc. to hold the vehicles in his fleet past January 1, 1965, instead of surrendering them during the 13th or 14th month of service. It seems worthy of note that the plaintiff not only did not complain of the defendant's arrangements as to the lease term at the time of the promulgation of the terms for 1964 but he is also not shown to have complained of the reduction in rates that he had to pay for the cars. It is obvious that the parties were operating in 1964 on the basis of the terms of Plaintiff's Exhibit 9 and not under Plaintiff's Exhibit 7.

Under letter dated October 5, 1964, Econo-Car International, Inc. announced to its Econo-Car dealers that the 1965 model cars would be delivered on a 6-month lease term, with the Econo-dealer having the option to extend the term to 12 months. (See Plaintiff's Exhibit 10). The ironic part of plaintiff's

complaints with respect to these changes in leasing terms is not that changes in leasing terms and arrangements were obviously contemplated by the basic franchise agreement, but rather that each of these changes would appear to have been beneficial to the Econo-Car dealers themselves. These leases progressively shortened the lease term and progressively gave the local dealers a greater option as to their power to extend the lease. As stated in Plaintiff's Exhibit 9, a shorter lease term not only enabled the Econo-Car dealers to be in the desirable position position of having the latest model and relatively new vehicles for rental, but also to effectuate a saving on maintenance and service costs which could usually be expected to increase with the greater age of the automobile.

We frankly fail to see where there is any evidence of a breach of a contractual provision with regard to the length of a lease term, and, if there was such a breach, we fail to see wherein plaintiff has proved any damages resulting therefrom. The flexibility of the Econo-Dealers lease term for the 1965 (Pltf's. Exh. 10) automobiles would appear to be just what Taute would have wanted.

2. Insurance Term Provisions.

The franchise agreement, Plaintiff's Exhibit 6, provided that Econo-Car would provide insurance including, among other things, collision insurance with no more than $100 deductible. This insurance was to be provided at "no additional expense". However, it should be noted that Taute made only one monthly payment to Econo-Car for the rental costs on the automobiles and this payment would necessarily include the cost of

insurance. What happened to the insurance rates and other rates is best illustrated by following a two-door Valiant. Plaintiff at the time of his Grand Opening paid $129 per month for a two-door Valiant. In December, 1963, Econo-Car reduced this monthly rental required to be paid by the plaintiff to $118. One month later, it announced under letter dated December 26, 1963 (Pltf's. Exh. 13) that it was forced to increase its outlay for insurance premiums and that it was finding it necessary to pass on an increase to the Econo-dealers of $5 per month. As a result, Taute then had to pay $123 for the Valiant that he had originally contracted to pay $129 for.

Under the Court's instructions to the jury (Tr.V.III, p.283) the jury was apparently authorized to award the additional amount paid by plaintiff, $5 per car per month, from January 1, 1964 through the end of the lease term. This was error in that it invaded the province of the jury and actually was contrary to the express provisions of the contract. We fail to see how the defendant could be said to have breached the contract when during this period it was charging the plaintiff $123 per month for the Valiant when plaintiff had actually contracted to pay $129 per month for the Valiant.

Commencing approximately September 1, 1964, defendant effectuated a change in its collision insurance coverage from $100 deductible to $250 deductible. In their information circulars, (Plaintiff's Exhibit 13) Econo-Car explained that they were presented with the choice by the fleet insurance carrier to either increase the deductible to $250 or pay an additional $8 per month per car. Econo-Car elected to increase the

deductible as was done by their competition.

The increase in deductible collision coverage would have the effect of increasing plaintiff's exposure for collision damage from $100 to $250 on those rentals on which he was unable to sell additional insurance to the renter which would eliminate any losses in the event of a collision. The automobile renter would presumably be responsible in the event that his negligence caused the collision damage so that the dealer's losses would be reduced to a minimal figure. However, if this change were not consented to by plaintiff and did constitute a breach of the franchise agreement, the Court's instructions allowing the difference between the value of a collision policy with a $100 deductible and a policy with a $250 deductible would allow the jury to award more than ample damages for this alleged breach. (See Tr.V.III, pp. 283-284).

3. Turn-In Charges.

Plaintiff has made much of changes in turn-in requirements. It is interesting to note, however, that the original franchise agreement contains no specifications with respect to turn-ins. It is also interesting to note that plaintiff was not relying upon Plaintiff's Exhibit 7 or upon Plaintiff's Exhibit 8 as contended at trial, when he protested to Chrysler Leasing Corporation's turn-in charges, but rather was relying upon Econo-Car's letter dated February 18, 1964. In Plaintiff's Exhibit 12 he states: "At this point I will pay only legitimate charges as provided for in your letter of February 18, 1964 'Car Condition-Turn-In of Lease Cars Inspection Guide'."

When Taute turned in his 1964 automobiles in November

of 1964, he received invoices from Chrysler Leasing Corporation making turn-in charges of several hundred dollars. He immediately and vociferously protested to Econo-Car (see Plaintiff's Exhibit 12) whereupon Econo-Car interceded with Chrysler Leasing Corporation and obtained a reduction of or elimination of all of these charges. According to plaintiff's own testimony his actual damages sustained under his own interpretation of the turn-in requirements amount to the cost of one tire, the sum of $20.50. (See Tr.V.II, p. 185). More significantly, plaintiff's counsel stated in his brief that "the matter was satisfactorily taken care of for Taute." (p. 9). Obviously, the award by the jury for the alleged breach of contract more than included any possible damages incurred under any possible breach of arrangements regarding turn-in requirements.

4. Plaintiff's Claim of Breach of Advertising Provisions.

Plaintiff complained, rather weakly, that the defendant breached the provisions of the contract with respect to advertising. Some changes were made in the advertising procedures, one of which was agreed to by Taute in writing (Pltf's. Exh. 15), but the net effect of the advertising changes was to Taute's benefit. Under paragraph 4.F of the franchise agreement Taute was to advertise locally, spending a minimum amount of $15 per month per car, and that Econo-Car would reimburse Taute upon receipt of proof of the local advertising to the extent of $7.50 per month per car operated by him. This procedure was followed for the first seven months of Taute's operation through May, 1964. In May of 1964 (Tr.V.I, p.78) a new advertising approach was developed by Econo-Car to which Taute agreed in

writing. Under this approach, Econo-Car would spend $22 per car per month, with Taute paying $7.50 of the total amount. Thus, the net effect of this change was that Taute paid the same, but the company would then pay $14.50 per car instead of $7.50 as under the initial arrangement. The program was delayed slightly in being effectuated and Taute was allowed to revert to the former arrangements for the month of June, 1964. The new arrangement was in effect during the months of July and August, 1964.

The advertising arrangements were again changed in the fall of 1964 to provide that Econo-Car would pay $22 per month per car on the basis of 75% of the local dealer's fleet. (Tr. V.I, p.84). The net effect of this arrangement would be that a total of $16.50 would be spent on local advertising by Econo-Car International, Inc. of which $7.50 would be paid by Taute and $9 by the company. Thus, even under this arrangement the company was paying $1.50 per month per car more than it had agreed to under the initial agreement. Advertising was suspended for the month of September, 1964, but the amounts expended by the company on advertising subsequent thereto more than made up for the deficit. In fact, during the period from July, 1964 through December, 1964, a little bit more than $22 per car per month had been spent on advertising. (Tr.V.II, pp. 221-222). Thus, Taute was spending $7.50 and the company was spending $14.50 per month, a total of $7 per month more than they were required to under the original contract. Taute further testified that the total spent during that period there was enough to make up for the deficit for not having had any

advertisement during the month of September. (Tr.V.II, p.223).

The Court was clearly and obviously correct in ruling as a matter of law that the defendant had not breached the contract with respect to the advertising clauses and that plaintiff had suffered no damages in connection with the advertising.

SUMMARY AND CONCLUSION

The theory of the Court's instructions to the jury on the measure of damages allowable for breach of contract was correct. This theory was that plaintiff would be entitled to all damages proximately caused by any breach of defendant limited by what plaintiff would have received had there been full performance. Defendant does contend that the Court invaded the province of the jury in its instruction that the $5 increase in rental payments brought on by the increase in insurance premium to it was a breach of the contract.

The trial court should be affirmed on the theory of its damage instructions on the breach of contract claim, but the judgment on plaintiff's first claim should be reduced by the sum of $607.00, the sum allocable to the $5 increase in rental payments as of January 1, 1964.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER

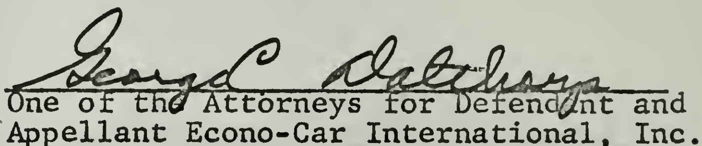
By George C. Dalthorp
500 Electric Building
P. O. Box 2529
Billings, Montana 59101
Attorneys for Defendant and
Appellant Econo-Car International,
Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of May, 1968, I deposited in the Post Office at Billings, Montana in an envelope securely sealed, with postage thereon prepaid, and addressed to:

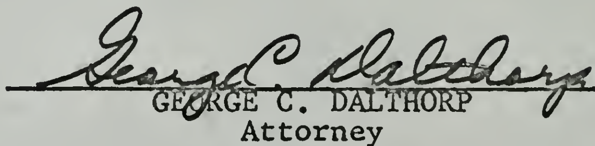
John C. Sheehy, Esquire
Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Building
Billings, Montana 59101,

true and correct copies of the foregoing Brief of Defendant Econo-Car International, Inc. Answering Brief of Plaintiff Carl M. Taute.



One of the Attorneys for Defendant and
Appellant Econo-Car International, Inc.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



GEORGE C. DALTHORP
Attorney